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In the Supreme Court of the United States

OCTOBER TERM, 1981

DONALD T. REGAN, SECRETARY OF THE TREASURY, ET AL.,
APPELLANTS,

v.

TAXATION WITH REPRESENTATION OF WASHINGTON,
APPELLEE.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Motion to Intervene, for an Extension of Time in Which to File a Jurisdictional Statement, and for Expedited Consideration Thereof

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Table of Contents

Page

Table of Authorities i
Statement 2
Argument 5
I. Intervention 5
A. Statutory considerations 5
B. Fed. R. Civ. P. 24 7
1. Timeliness 7
2. Veterans' Interest 9
3. Adequacy of Representation 10
4. Common Issues 11
C. Other considerations favoring intervention 11
II. Expedition 13
III. Extension of time 14
Conclusion 15
Index to Appendix ..... follows 15

Table of Authorities

Cases

Banks v. Chicago Grain Trimmers, 389 U.S. 813 (1967) ... 10n
Consumer Energy Council of America v. FERC, Nos. 80-2184 et al. 12n
Dames & Moore v. Regan, 452 U.S. 932 (1981) 10n
Eastern-Central M.C. Assn. v. U.S., 321 U.S. 194 (1944) .. 10n
International Union, Local 283 v. Scofield, 382 U.S. 205 (1965) 6, 7, 11

Page

NAACP v. New York, 413 U.S. 345 (1973) 7, 8

NLRB v. Acme Industrial Co., 384 U.S. 925 (1966) 10n

NLRB v. Baptist Hospital, Inc., 440 U.S. 943 (1979) 10n

Taxation with Representation of Washington v. Blumenthal, 79-1 CCH U.S.T.C. ¶ 9185, 43 AFTR 2d 79-679 (D.D.C. Jan. 31, 1979) 2

Taxation with Representation of Washington v. Regan, 82-1 CCH U.S.T.C. ¶ 9272, 49 AFTR 2d 82-961 (D.C. Cir. Mar. 26, 1982) 2, 3, 4, 9n, 10

Trbovich v. UMW, 404 U.S. 528 (1972) 11

United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977) 8

U.S. v. Terminal R.R. Assn., 236 U.S. 194 (1915) 10n

STATUTES

28 U.S.C. § 1252 .....8, 13

28 U.S.C. § 2101 .....8, 13

36 U.S.C. §§ 90c and 1153 .....10n

36 U.S.C. §§ 90f and 1156 .....10n

Internal Revenue Code of 1954, as amended, 26 U.S.C.:

§ 170(c) 4

§ 170(c)(3) 9, 10

§ 501(c) 3, 4, 9, 10

§ 501(c)(3) 2, 3

§ 501(c)(4) 4, 9, 9n

§ 501(c)(19) 9

§ 7428 .....2, 5, 6, 7

Tax Reform Act of 1976, Pub.L.No. 94-455 6

Page

Rules

Federal Rule of Appellate Procedure 4(a) 8
Federal Rules of Civil Procedure:
24 .....5, 7
24(a)(2) 9
24(b)(2) 11
Supreme Court Rules:
11.2 8
12.1 13
12.2 14
15.3 12
16.1 14
16.5 12
28.1 .....5n
29.2 14
34.3 12
34.4 12
36.1 .....12, 14
36.2 12
42.2(b) 14
42.4 13

Other Authorities

IRS Publication No. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code (1981) 4, 9n
H.R. Rep. No. 658, 94th Cong., 1st Sess. 284 n.6 (1975) 6
S. Rep. No. 938, 94th Cong., 2d Sess. 587 n.6 (1976) 6

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The Disabled American Veterans ("DAV") and the Paralyzed Veterans of America ("PVA") (collectively, "Veterans") hereby move for leave to intervene as appellants in this case, for expedited consideration of this motion to permit its resolution during this term of Court, and for a thirty-day extension of time in which to file their jurisdictional statement should intervention be granted.

STATEMENT

Although this motion is the first document to be filed in the Supreme Court in this case, the Government (Treasury Secretary Regan, *et al.*), appellees in the Court of Appeals for the District of Columbia Circuit, have timely filed a notice of appeal in the appellate court and are expected to file a jurisdictional statement as appellants herein by June 22, 1982.

The Veterans have not heretofore participated in this litigation but seek to do so now as parties because, although the Court of Appeals' en banc opinion directly threatens important interests of theirs, the Veterans had not earlier been aware of the case. *See* p. 8-9, *infra*. The action was commenced by Taxation With Representation of Washington ("Taxation"), appellee in this Court. Having been denied the tax exemption it sought from the Internal Revenue Service ("IRS") under Section 501(c)(3) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 501(c)(3), Taxation brought suit against the Government in the U.S. District Court (D.D.C.) for a declaratory judgment under 26 U.S.C. § 7428 seeking to overturn that denial on constitutional grounds.

The District Court (Pratt, J.) granted summary judgment for the Government. *Taxation with Representation of Washington* v. *Blumenthal*, 79-1 CCH U.S.T.C. ¶ 9185, 43 AFTR 2d 79-679 (D.D.C. Jan. 31, 1979). The Court of Appeals affirmed, two to one (*MacKinnon* and Robb, J.J.; Mikva, J., dissenting), but on rehearing en banc, the Court of Appeals reversed, seven to three (*Mikva*, Robinson, Wright, Tamm, Wald, Edwards and Ginsburg, J.J.; *MacKinnon*, Robb and Wilkey, J.J., dissenting). *Taxation with Representation of Washington* v. *Regan*, 82-1 CCH U.S.T.C. ¶ 9272, 49 AFTR 2d 82-961 (D.C. Cir. Mar. 26, 1982) (a copy of the en banc slip opinion is appended hereto as Exhibit A; citations hereinafter will be to the slip opinion).

Section 501(c)(3) applies to organizations, *inter alia*, "no substantial part of the activities of which is . . . attempting, to influence legislation . . . ." The IRS denied Taxation's application for qualification under § 501(c)(3) because one of its stated purposes was to attempt to influence legislation. No such restriction on legislative activities exists with respect to veterans' organizations qualified under § 501(c). In its decision respecting this disparity, the Court of Appeals held:

> By subsidizing the lobbying activities of veterans' organizations while failing to subsidize the lobbying of Taxation and other charitable groups, Congress has violated the equal protection guarantees of the Constitution.

Taxation v. *Regan*, slip op. at 2.

To remedy the constitutional defect it found, the Court of Appeals remanded the case to the District Court to fashion appropriate relief, observing:

> It seems evident that the legislative judgments expressed in Section 501(c) will be less disturbed by striking down the preferential treatment now accorded the lobbying of veterans' organizations than by extending that treatment to Section 501(c)(3) organizations.

Id. at 59. However, knowing that

> the veterans' organizations that would be directly affected by nullification of preferential treatment in Section 501(c) have not heretofore been parties to this litigation,

id., the Court of Appeals instructed the District Court to

> cure the constitutionally invalid operation of Section 501(c) after inviting veterans' organizations to participate in framing the relief.

Id. at 60.

Not content to participate only in a remedial proceeding, after learning of the decision, the Veterans simultaneously filed in the Court of Appeals a motion to intervene and for expedited consideration accompanied by affidavits from DAV and PVA (appended hereto as Exhibit B) and a timely notice of appeal (appended hereto as Exhibit C). The Veterans' motion was entered on the docket of the Court of Appeals (appended hereto as Exhibit D) before the Government's notice of appeal; the Veterans' motion and its and the Government's notices of appeal were all filed on April 23, 1982. Taxation consented to the Veterans' motion, but the Government filed an opposition (appended hereto as Exhibit E), to which the Veterans replied (appended hereto as Exhibit F). On May 27, 1982, the Court of Appeals denied the Veterans' motion without opinion (order appended hereto as Exhibit G).

As set forth in the affidavits at Exhibit B, DAV and PVA are each a veterans' organization chartered by an Act of Congress, *see* note 3 *infra*. Each is exempt from federal income taxation under § 501(c)(4) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 501(c)(4), and contributions to each are deductible under § 170(c) of the Code. *See* IRS Publication No. 78, Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code (1981). Each of the veterans' organizations has a legislative program by which it seeks to influence legislation to secure benefits for its members and other veterans similarly situated, and each receives

varying proportions of its annual income from deductible contributions.[1]

ARGUMENT

The Veterans should be allowed to intervene because the Congress encouraged such participation in actions under 26 U.S.C. § 7428, because their motion fully satisfies the criteria for intervention set forth in Fed. R. Civ. P. 24, because their intervention will not prejudice existing parties or the sound administration of justice, and because to relegate the Veterans to proceeding as *amici curiae* would deny them important advantages. To make intervention fully effective this motion should be decided this Term because jurisdictional statements are due from appellants this month. To give the Veterans a reasonable opportunity to prepare their consolidated jurisdictional statement without delaying the course of the litigation, the Veterans request an extension of thirty days to file it from the time it would otherwise have been due, counting from the day their notice of appeal was filed in the Court of Appeals.

I. Intervention.

A. *Statutory Considerations.*

Although there are no specific standards for intervention after judgment provided by Congress or in the federal pro-

[1] In accordance with Sup. Ct. R. 28.1, the Veterans state that there are approximately 2,500 state departments, local chapters, and auxiliary organizations nationwide affiliated with DAV. Each of these affiliates, except the National Order of Trench Rats, includes the words "Disabled American Veterans" in its name. PVA has 35 chapter affiliates located in 33 states, Mexico and Puerto Rico, and is affiliated with the Paralyzed Veterans of America Technology and Research Foundation. Each of its chapters includes the words "Paralyzed Veterans of America" in its name. PVA also has a subsidiary, PVA-EPVA, Inc., of which it is part owner.

cedure or court rules, the question of what criteria should be applied in ruling upon such a motion was answered by this Court in *International Union, Local 283 v. Scofield*, 382 U.S. 205 (1965). In *Scofield*, this Court reversed the denials by two separate Courts of Appeals of motions to intervene in appellate proceedings reviewing decisions of the National Labor Relations Board. The Court commenced its analysis by examining the statutory provisions of the Labor Act which governed the proceedings at issue and determined that Congress conferred on the petitioners before the Court a right to intervene. *Id.* at 217.

In this case, while it cannot be said that 26 U.S.C. § 7428, under which this case was originally brought, confers such a right, its legislative history does make plain that Congress intended courts to favor intervention in § 7428 proceedings. In virtually identical reports from the House and Senate committees considering the measure that contained § 7428 as part of the Tax Reform Act of 1976, Pub. L. No. 94-455, it was stated (in the Senate version) that

> the committee does intend that with respect to accepting *amicus curiae* briefs *and permitting appearances by third parties* in declaratory judgment suits under this amendment *the courts should be as generous as they can be*, in the light of the need for expeditious decisions in those cases and the general state of the courts' calendars.

S. Rep. No. 938, 94th Cong., 2d Sess. 587 n.6 (1976) (emphasis added); *see also* H.R. Rep. No. 658, 94th Cong., 1st Sess. 284 n.6 (1975).

As this Court noted in *Scofield*:

> The rights typically secured to an intervenor in a reviewing court . . . are not productive of delay nor do they cause complications in the appellate courts.

Id., 382 U.S. at 215. Accordingly, since this case does not present the considerations Congress thought might militate against third-party participation at trial, the Veterans urge this Court to exercise the generosity which Congress encouraged it to extend to third parties like the Veterans in § 7428 actions.

B. *Fed. R. Civ. P. 24.*

The discussion in *Scofield* was "limited to Labor Board review proceedings," *id.* at 210, but the Court found a helpful analogy in the Federal Rules of Civil Procedure. *Id.* at 216. Acknowledging that Fed. R. Civ. P. 24 applied only in the federal district courts, the Court nonetheless observed that "the policies underlying intervention may be applicable in appellate courts." *Id.* at 217 n.10.

1. Timeliness.

Rule 24 sets forth standards for both mandatory (Rule 24(a)) and permissive (Rule 24(b)) intervention, and begins with the phrase "upon timely application." As this Court said in ruling upon the lower-court denial of a motion to intervene after judgment:

> [T]he court where the action is pending must first be satisfied as to timeliness. Although the point to which the suit has progressed is one factor in the determination of timeliness, it is not solely dispositive. Timeliness is to be determined from all the circumstances.

NAACP v. *New York*, 413 U.S. 345, 365-6 (1973) (footnotes omitted).

More specifically, as this Court noted in referring to *NAACP* v. *New York* on this point: "The critical inquiry in every such case is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 395-6 (1977). *McDonald* focused on whether a motion to intervene, filed after entry of a district court's final judgment, was timely. Since Fed. R. App. P. 4(a) requires that a notice of appeal be filed in the district court within thirty days after the entry of judgment, and the movant-respondent in *McDonald* filed her motion to intervene within that period, this Court concluded that she had timely filed, *id.* at 396, and, therefore, affirmed the appellate decision permitting her to intervene.

Similarly here, the Veterans filed their motion to intervene (and their notice of appeal) within the time allowed for filing a notice of appeal. Since the Court of Appeals held that an Act of Congress was unconstitutional, *supra* p. 3, 28 U.S.C. § 1252 makes its judgment appealable to this Court. Under Sup. Ct. R. 11.2 and 28 U.S.C. § 2101, a notice of appeal in such a case must be filed in the Court of Appeals within thirty days from the entry of judgment, or by April 26, 1982. The Veterans filed their motion to intervene and notice of appeal on April 23, 1982.

The other significant circumstance which operates to make the Veterans' motion timely, despite the stage to which the suit has progressed, is that they only recently became aware, not only of the need to act to protect their interests in this case, but also of the very existence of the litigation. As recited in the DAV and PVA affidavits at Exhibit B, the Veterans did not know about the pendency of this case until after the en banc decision of the Court of Appeals was announced (and given widespread publicity). The Veterans' state of knowledge on this score is not surprising since, as indicated earlier, *supra* p. 2, the decisions of the District Court and the panel of the

Court of Appeals that originally heard the appeal each rejected Taxation's claims (which in any event did not challenge the tax status of veterans' organizations) and thus raised no prospect of jeopardy that might have come to the Veterans' attention. Once learning of the en banc decision, however, the Veterans moved promptly and took the earliest possible step they could have taken to protect their interests herein by seeking to intervene and appeal the decision.

2. Veterans' Interest.

Rule 24(a)(2) makes intervention a matter of right when the movant claims an "interest" in the subject of the action and the disposition of the action "may" interfere with his/her ability to protect that interest unless it is "adequately represented" by existing parties. There is no doubt that important interests of the Veterans are at stake in this case, and the Veterans should be allowed to intervene to protect their interests because existing parties may not effectively do so.

Section 170(c)(3) of the Code, 26 U.S.C. § 170(c)(3), makes deductible contributions to a "post or organization of war veterans" regardless of whether its qualification for income-tax exemption is based upon § 501(c)(4)[2] (like DAV and PVA) or § 501(c)(19) (like other veterans' organizations). The opinion of the Court of Appeals creates a clear risk to the ability of veterans' organizations to maintain both their tax-exempt status under § 501(c) (and the tax-deductible status of con-

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[2] The Court of Appeals stated that Section 501(c)(4) organizations "are not eligible to receive tax-deductible contributions" and that they "may lobby but receive no tax-deductible contributions." *Taxation* v. *Regan*, slip op. at 9 and 12. The court's generalization is not correct concerning veterans' organizations qualified under Section 501(c)(4) which, like any "organization of war veterans," may receive contributions which are deductible by the donors. 26 U.S.C. § 170(c)(3); *see* IRS Publication No. 78, *supra* p. 4.

tributions to them under § 170(c)(3)) and their ability to attempt to influence legislation without restriction and without government regulation.[3] The Court of Appeals itself expressly recognized that veterans' organizations would be "directly affected" by the remedy it found "most logical." *Taxation* v. *Regan*, slip op. at 59.[4]

3. Adequacy of Representation.

The inadequacy of representation of the Veterans by existing parties was also demonstrated by the Court of Appeals, which provided an indication that the Government is not effectively representing those groups (because, the Veterans would argue, it is defending the federal statutory scheme generally and not the specific interests of veterans' organizations). On the critical question of identifying public objectives that might support the classification within § 501(c) for purposes of an equal protection analysis, and as to which the

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[3] The Congressional charters of DAV and PVA limit the purposes of those organizations to activities that affect or directly benefit persons who satisfy the restrictive membership qualifications of each organization. 36 U.S.C. §§ 90c and 1153. Each organization's charter also states that the organization is nonpolitical and may not promote the candidacy of any person seeking public office. 36 U.S.C. §§ 90f and 1156.

[4] While it is sometimes the case that, were the movant to intervene after judgment not allowed to participate as a party, there would be no person able to seek review of the case to protect the interests of the movant, this Court has granted intervention in numerous cases before it where there was no necessity to do so in order to insure review of the lower court decision in question. *See, e.g., Dames & Moore* v. *Regan*, 452 U.S. 932 (1981); *NLRB* v. *Baptist Hospital, Inc.*, 440 U.S. 943 (1979); *Banks* v. *Chicago Grain Trimmers*, 389 U.S. 813 (1967); *NLRB* v. *Acme Industrial Co.*, 384 U.S. 925 (1966); *Eastern-Central M.C. Assn.* v. *U.S.*, 321 U.S. 194 (1944); *U.S.* v. *Terminal R.R. Assn.*, 236 U.S. 194, 199 (1915) ("although the petitioners were not parties, they are entitled to be originally heard concerning the settlement of the decree insofar as it might operate prejudicially to their rights").

Court of Appeals found "no identifiable governmental interests," *id.* at 51, the court noted: "The government made no attempt in the district court to present affidavits or other evidentiary material." *Id.* at 35. Moreover, if the Veterans were, for example, to seek a disposition of the case on grounds of justiciability (now under consideration) and the Government were to insist on a merits resolution (see Exhibit E, at 2), there would be an evident conflict between the two.[5] It should be emphasized in this context that the test under Rule 24(a)(2) is only that there "may" be inadequate representation, and the burden of showing that should be "minimal." *Trbovich* v. *UMW*, 404 U.S. 528, 529 n.10 (1972).

4. Common Issues.

Finally, the Veterans submit that the Court should permit them to intervene because their position regarding the constitutionality of their tax status presents a question in common with the issues in this case, satisfying the standard for permissive intervention under Rule 24(b)(2).

C. *Other Considerations Favoring Intervention.*

Other factors appropriately considered in evaluating a motion to intervene also operate in favor of allowing the Veterans' motion. First, granting the motion to intervene at the appellate level will not prejudice existing parties nor adversely affect the administration of justice, *see Scofield*, *supra* pp. 6-7, particular-

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[5]The fact that an intervenor might present new and different issues to the Court were intervention granted is a factor favoring the grant. As *Scofield*, *supra*, declared, "Participation in defining the issues before the court guarantees that all relevant material is brought to its attention, and makes the briefs on the merits more meaningful." 382 U.S. at 215.

ly since the Veterans will consolidate their positions into a single submission in all subsequent filings as they have in this one.

Second, there are important procedural advantages to proceeding as parties rather than as *amici curiae* which would enhance the Veterans' ability to protect the interests they have at stake. They include, at the jurisdictional stage, the right to file a thirty-page jurisdictional statement rather than a twenty-page brief supporting the Government, *compare* Sup. Ct. R. 15.3 *with* Sup. Ct. R. 36.1, and the right to file a ten-page reply rather than no reply. *Compare* Sup. Ct. R. 16.5 *with* Sup. Ct. R. 36.2. Should the Court note probable jurisdiction, the advantages further include the authority to file a fifty-page rather than a thirty-page brief on the merits, *compare* Sup. Ct. R. 34.3 *with* Sup. Ct. R. 36.2, and the right to file a twenty-page reply rather than no reply. *Compare* Sup. Ct. R. 34.4 *with* Sup. Ct. R. 36.2. The comparatively greater attention paid to briefs submitted by parties over that paid to briefs *amici curiae* is not as quantifiable a benefit, but the Veterans suggest it is one just as real.[6]

Last, DAV and PVA have a collective membership of over 700,000, all of whom are veterans of service in the United States Armed Forces who suffer spinal-cord injury or disease or who otherwise possess disabilities formally recognized under

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[6] That the United States shares the Veterans' view that it is more valuable to participate in the Supreme Court as an intervenor than as an *amicus curiae* is evidenced by at least one recent occasion in which the Government sought and obtained that preferred status. Following the decision earlier this year by the Court of Appeals for the District of Columbia Circuit in *Consumer Energy Council of America* v. *FERC*, Nos. 80-2184 *et al.*, regarding the constitutionality of the legislative veto, the Government filed in the appellate court a motion to intervene — even though it had previously participated in the case as an *amicus curiae* — "in order to present fully the views of the Executive . . . before the Supreme Court." The Court of Appeals granted that motion. The motion of the United States and the Court's order are appended hereto as Exhibit H.

federal law. The consequences of an adverse ruling on the merits of this case to the Veterans alone would thus reach pervasively into American society to affect persons who by their very status have traditionally received special consideration, not only by such a ruling's technical potential tax consequences, but perhaps more importantly by the announcement of a principle that results in essence in a diminution of a status held by veterans' organizations for nearly fifty years. Under these circumstances, absent a sound reason militating against their intervention and in light of the unique history and procedural posture of this case, the Veterans submit that they should be accorded the advantages accruing to parties before the Supreme Court of the United States.

II. Expedition.

Assuming that a grant of the Veterans' motion to intervene would operate *nunc pro tunc*, their notice of appeal would have been effective upon filing on April 23, 1982. As noted earlier, *supra* p. 8, the Court's jurisdiction in this case is predicated on 28 U.S.C. § 1252. Under 28 U.S.C. § 2101 and Sup. Ct. R. 12.1, the Veterans would therefore have to docket their appeal by filing a jurisdictional statement by June 22, 1982. Since this Term of Court is rapidly coming to a close, the Veterans would ask for a decision on their motion before that occurs, in time for them timely to docket their appeal if intervention is granted. The Court need not await a response before deciding this motion, Sup. Ct. R. 42.4; in any event, the response of existing parties in the Court of Appeals has been provided, *supra* p. 4, and undersigned counsel orally informed the Solicitor General's office on June 1, 1982, and counsel for Taxation on June 3, 1982, that this motion would be filed on June 4, 1982.

III. Extension of Time.

If intervention is granted, the Veterans further ask, pursuant to Sup. Ct. R. 29.2 and 12.2, that this Court extend the time for filing its jurisdictional statement to July 21, 1982. Were the Veterans to be required to file their jurisdictional statement at the same time as the Government since their notices of appeal were filed on the same day, they would have little more than a week after learning of their intervenor status to prepare that document, assuming that this Court rules on the Veterans' motion as expeditiously as possible. Parties have sixty days from the filing of the notice of appeal to file their jurisdictional statement. Sup. Ct. R. 12.1. The Veterans request considerably less time than this.[7] Allowing the Veterans' appeal to be docketed in mid-July would not affect the course of the litigation because no decision would be made on jurisdiction in this case until October 4, 1982, at the earliest.[8]

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[7] The Veterans have no reason to be prepared earlier than the requested date because, were they left to proceed as *amici curiae*, their brief in support of the Government's jurisdictional statement would not be due until 30 days after appellee Taxation receives the latter, which would likely be no earlier than it is now due to to be filed (June 22, 1982). *See* Sup. Ct. R. 36.1 and 16.1.

[8] Because of the need to move swiftly in this Court following the decision of the Court of Appeals, the Veterans originally filed this motion in typewritten form on June 4, 1982 and represented, in this same footnote space in the typewritten motion, that they would, as required by Sup. Ct. R. 42.2(b) and as soon as practicable, provide the Court with 40 printed copies of the motion in this form as requested by the clerk of the court.

CONCLUSION

For the foregoing reasons, the Veterans ask that the Court grant their several requests.

Respectfully submitted,

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Index to Appendix
to Motion to Intervene, etc.
in Regan v. Taxation, No. ,
Filed June 4, 1982

EXHIBIT A	Opinion of the Court of Appeals for the District of Columbia Circuit (en banc)
EXHIBIT B	Motion of Disabled American Veterans and Paralyzed Veterans of America to Intervene, with accompanying Affidavits
EXHIBIT C	Notice of Appeal of Disabled American Veterans and Paralyzed Veterans of America
EXHIBIT D	Court of Appeals Docket
EXHIBIT E	Government's Opposition to Motions for Intervention
EXHIBIT F	Reply of Disabled American Veterans and Paralyzed Veterans of America to Government's Opposition
EXHIBIT G	Order of Court of Appeals Denying Motion to Intervene
EXHIBIT H	Government's Motion to Intervene and Order of Court of Appeals granting motion in *Consumer Energy Council of America* v. *FERC*